

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of

Effects of Communications Towers on
Migratory Birds

To: The Commission

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WT Docket No. 03-187

COMMENTS OF WASHINGTON STATE ASSOCIATION OF BROADCASTERS

The Washington State Association of Broadcasters (“WSAB”), by its attorneys and pursuant to Sections 1.415 and 1.419 of the FCC’s Rules, hereby submits comments in the above-referenced Notice of Inquiry (“NOI”). WSAB is a non-profit organization representing the interests of FCC radio and television broadcast licensees in the State of Washington.

WSAB’s concern in this proceeding is not with the nature of the NOI, which the FCC has initiated “to gather comment and information on the impact that communications towers may have on migratory birds.” NOI at par. 1. Rather, WSAB is concerned about subsequent action the FCC might take to regulate communications towers as a result of the findings in this proceeding. WSAB urges the FCC to proceed prudently in this area in light of: 1) the relatively limited effect of towers on migratory birds; and 2) the FCC’s primary obligation to regulate and promote communications services in the United States. While the FCC has obligations under federal environmental laws¹ to examine the impact of its actions, including its regulation of broadcast towers, it must not compromise its obligations as the custodian of the nation’s airwaves in so doing.

¹ The National Environmental Policy Act (“NEPA”), the Endangered Species Act (“ESA”) and the Migratory Bird Treaty Act (“MBTA”) are at issue herein.

Bird Strikes at Communications Towers are Uncommon in Washington State

Studies thus far on the effects of communications towers on migratory bird populations have shown that bird strikes occur only in limited areas of the country, at certain times of the year, and for the most part at very tall towers. The combination of these factors might create a situation in which a tower has an adverse effect on migratory birds, and no doubt comments will be submitted in this proceeding reporting such effect. However, because of the relatively small number of bird strikes, a proper perspective must be maintained in considering what, if any, action the FCC should take in the matter.

WSAB submits that, in the State of Washington, bird collisions with towers are the exception, not the norm. Broadcasters in Washington State know from their many years of experience that most towers pose no harm, and in fact some towers are beneficial, to local and migratory bird populations. WSAB recently queried its member stations as to whether there have been bird kills at their tower sites. Dozens of station managers and engineers, some of whom have been in broadcasting for many years, at many different stations across the country, responded to the inquiry. Virtually all reported that they have never experienced significant numbers of bird kills at any tower site. In fact, several noted that birds use the towers and guy wires to roost. Attached hereto as Exhibit A is the Statement of Mark Allen, WSAB President and CEO, summarizing the results of the WSAB survey of its members. The responses provided therein offer compelling evidence that there is no adverse effect on birds caused by towers in Washington State.

The FCC's Primary Obligation is to Regulate And Promote Communications Services

The FCC is responsible for regulating industries that critically impact the life of virtually every American -- the communications industries. The FCC's primary function is to "make

available, so far as possible, to all people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities” NOI at par. 5, citing 47 U.S.C. § 151. The FCC must keep pace with technology by deploying new services as rapidly as possible for the benefit of the public. *Id.*, citing 47 U.S.C. § 309(j)(3)(A), (D). In addition, the FCC plays a critical role in developing a comprehensive emergency communications system to ensure that a seamless network for prompt emergency service is available throughout the United States. *Id.*, citing Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, enacted Oct. 26, 1999.

Strategically located and expertly engineered communications towers are among the “adequate facilities” essential to providing a national communications service. In fact, communications towers form the backbone of this country’s communications infrastructure. A tower’s location, height, antenna placement, design, and layout are critical to its ability to transmit communications to the public in the most efficient and effective manner possible.² Therefore, appropriate regulation of communications towers is an integral part of the FCC’s ability to provide and promote communications services.

NEPA requires that federal agencies consider the environmental impact of major federal actions that affect the quality of the human environment and to follow certain procedures in the decision-making process. 42 U.S.C. § 4332(2)(C); *see also Citizens Against Burlington, Inc. v. Busey*, 928 F.2d 190, 193-94 (D.C. Cir. 1991). Before approving a project or action, an agency must prepare a detailed statement on, *inter alia*, the environmental impact, adverse environmental effects that cannot be avoided, and alternatives to the proposed action. 42 U.S.C.

² Consider, for example, the significance of those factors to an AM tower, or tower array. In AM, the tower or array serves as the transmitting antenna. The precise location and layout of the towers, the ground system that must be laid, the particular ground conductivity, as well as the tower height and other variables are essential elements of its transmitting capability. Such towers cannot easily be moved or altered without significantly impairing a station’s service to its audience.

§ 4332(C). NEPA does not explain what constitutes “alternatives to the proposed action.” However, the regulations of the Council on Environmental Quality provide that at that heart of the environmental statement is the requirement that the agency rigorously explore and objectively evaluate all “reasonable alternatives” to the project. 40 C.F.R. § 1502.14.

The United States Court of Appeals for the District of Columbia Circuit has provided guidance to federal agencies in this regard. In *City of Alexandria, Virginia v. Slater*, 198 F.3d 862 (U.S. App. D.C. 1999), *rehearing en banc den.* (2000), the court examined the ambiguity of the NEPA mandate to explore “reasonable alternatives” and concluded that it would evaluate an agency’s choice in light of the objectives of the federal action. Citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991), the court observed that “[t]he goals of an action delimit the universe of the action’s reasonable alternatives.” *City of Alexandria, Virginia v. Slater* at 867. An alternative proposal, therefore, would not be reasonable if it failed to meet the objectives of the federal action. *Id.*

Accordingly, “[t]he proper question to ask at the outset of a NEPA inquiry is not whether the Administration focused on environmental goals but rather...whether its stated objectives were reasonable.” The court added, “[i]t seems rather obvious to us that it is not unreasonable in articulating its objectives for an agency to ‘focus primarily on transportation and safety issues.’” *City of Alexandria, Virginia v. Slater* at 867.

Similarly, it is not unreasonable for the FCC, in formulating its objectives in its analysis of the effects of communications towers on migratory birds, to focus on its mandate to provide a comprehensive communications service throughout the United States, and the critical role that communications towers play therein. Indeed, it is imperative that it do so. Congress intended NEPA to be a supplemental, not a superseding, statute, supplemental only to the extent that it is reconcilable with an agency’s primary duties. *See Young v. General Services Administration*,

99 F.Supp.2d 59, 71 (D.D.C. 2000), citing *Environmental Defense Fund, Inc. v. Mathews*, 410 F.Supp. 336, 337 (D.D.C. 1976). The Supreme Court has cautioned that “NEPA was not intended to repeal by implication any other statute” and that “where a clear and unavoidable conflict in statutory authority exists, NEPA must give way.” *Id.*, citing *Flint Ridge Development Co. v. Scenic Rivers Assoc.*, 426 U.S. 776, 788 (1976).

ESA is likewise a supplemental statute. ESA prohibits the “taking” (e.g., killing, capturing, wounding, *etc.*) of a species, but an otherwise prohibited “taking” may be authorized if it is incidental to, and not the purpose of, the carrying out of an otherwise lawful act. 16 U.S.C. § 1539(a)(1)(B).

In the instant proceeding, the FCC’s primary statutory obligation to promote the provision of communications services takes precedence over its supplemental obligations under the environmental laws. Because of the vital role communications towers play in carrying out the FCC’s mandate, any regulation thereof should be undertaken sparingly and with the utmost scrutiny.

The FCC has broad discretion in this area. As long as it has taken a “hard look” at an action and followed NEPA’s procedures, its action will not be overturned unless it is arbitrary, capricious, or an abuse of discretion. *See Young v. General Services Administration* at 68, citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 377 (1989). Moreover, “once an agency has made a decision subject to [NEPA’s] procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot ‘interject itself within the area of discretion...as to the choice of the action to be taken.’” *Young v. General Services Administration* at 68, quoting *Stryker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980). Under these standards, it would not be arbitrary, capricious or an abuse of the discretion if the FCC were to take a “hard look” at the information

submitted in this proceeding and then conclude that, in light of the vital importance of communications towers in carrying out the FCC's mandate to promote communications service in this country, no further regulation of towers is warranted.

Accordingly, WSAB urges the FCC to evaluate the information submitted in this proceeding carefully in light of the relatively limited effect of communications towers on birds, coupled with the subordinate nature of the FCC's obligations under the environmental laws. In deciding whether to take any action that would affect communications towers, the FCC must not compromise its primary and superseding obligation to preserve and promote the critically important communications services in this country that depend on such towers for their operations.

Respectfully submitted,

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Exhibit A

Statement of Mark Allen, Esq. President & CEO Washington State Association of Broadcasters

The Washington State Association of Broadcasters (“WSAB” or “the Association”) is a tax-exempt, non-profit trade association representing the broadcast radio and television stations licensed to communities in the state of Washington. I am the President & CEO of the Association. I hereby submit this Statement as Exhibit A to the Comment of the Association in WT Docket No. 03-187, In the Matter of Effects of Communications Towers on Migratory Birds.

Well constructed and executed empirical scientific studies of the interaction between migratory birds and communications towers will be of significant importance in assisting the Commission in determining whether actions can, or need to, be taken to protect migratory birds from injury or death when transiting near communications towers. The Association also believes that of equal importance are the hands-on experience and the daily observations of broadcasters whose engineering staffs work on or around these towers day and night; day-in and day-out; in good weather and bad; some of whom actually live at the tower site.

The Association surveyed its members in order to provide this important observational and experiential evidence to the Commission in this proceeding. WSAB asked the stations to report to the Association any recent or historical collision incidents, bird kills or other interactions between their transmission towers and migratory or other birds. WSAB surveyed 46 member stations or station groups, representing more than 230 separate stations.

Their responses lead the Association to three important conclusions:

1. Migratory bird deaths, indeed death or injury to any birds, are rare;

2. Towers provide respite for migratory birds and homes for resident flocks; and,
3. In any future structured scientific study of migratory bird kills around communications towers, it will be very important to take into consideration the fact that predators, such as eagles and hawks, use the towers to launch attacks on birds of all kinds, including migratory birds.

The following is a sampling of the responses received by the Association to its survey of Washington stations.

- A station manager whose towers are on a peninsula in the middle of a lake says in the Columbia Basin, within ten miles of the Columbia National Wildlife Refuge and within 25 miles of the Saddle Mountain National Wildlife Refuge reported: "Our towers have been located on what is called "the island" (it's actually a small peninsula) since 1957. I have been here since 1984 and have never heard of or seen any problems with birds. In fact, the island is host to hundreds, if not thousands, of geese, ducks, herons, cranes...you name it, each year. The place is thick with them, and there have been no incidents."
- The tower engineer for a Western Washington station says: "I have lived on the tower site with three 500 foot towers for 30 years. I have yet to find a bird dead around the towers. I have found a lot of owl droppings and other bird droppings. I have seen the guy wires covered with them as they prepare to fly south for the winter. I have never seen or heard a bird fly into the tower or guy wires. I have seen all kinds of birds land on the towers and fly around the towers. Many hawks and eagles have used the towers as a perch to hunt the fields around the towers."
- The Director of Engineering for a large cluster of stations near the Washington/Idaho boarder writes: "I manage some twenty towers with facings ranging in size from 6 inches to 7 feet and heights from 40 to 950 feet. In my 34 years of broadcasting I have never experienced a single 'hit' by birds. Quite to the contrary the birds, in many cases, 'move in,' nest and can create messes that must be periodically cleaned. I have also observed large hawks and eagles perching at elevated levels (above 300 feet) on AM towers awaiting prey across the open fields that the ground radial systems provide."
- An engineer for a TV station whose transmitter sits atop Ahtanum Ridge just south of Yakima, WA, says, "in September of this year, we found 3 small dead birds within 10 feet of each other at the perimeter of our fenced compound (well away from the tower and adjacent to our main power pole/transformers) all in the period of about a week's time. Birds do nest in and around our building there and we would not class these birds as migratory. We were operating on a tower side-mounted stand-by antenna from February through mid-September and that is the only such instance of bird-kill we have had in my recollection over these past 24+ years."

- The station manager of a TV station which has its tower on Krell Ridge (a/k/a “Tower Mountain”) southwest of Spokane, WA, where the majority of Spokane TV stations have their towers, reports: “Not even our longest-term employed technicians could ever remember finding birds at the base of our tower. No eagles; no ducks; no geese; no birds at all.” The Chief Engineer for two more TV stations that share a different tower at the same site on Krell Ridge reports that the tower has not “experienced any migratory bird collisions since it was installed in 1963.”
- The Chief Engineer of a TV station with a 303’ tower on a ridge on the breaks of the Snake River in southwest Washington reports that “in my time, I have never seen any migratory birds come into any kind of contact with our tower, antenna or the guy wires. I have also never seen any dead or injured birds near the base.”
- A small radio station owner/engineer in southeast Washington says: “I can show you pictures of well over 200 birds perched on my AM tower every day. They wouldn’t have a home without my tower.”
- A station engineer from southwest Washington, along the Columbia River reports: In twenty seven years I have seen only one migratory bird (a Canadian goose) that was dead underneath a set of towers. In that case the tower bases were at 1000’ ABSL. The towers were 645’ in length with two sets of guys, top height 1645’. The area was in the West Hills of Portland. This area was what can be imagined weather-wise, as the weather breaks form West to East across the West Hills all winter long. The only other birds that I have found dead were domestic pigeons with their bands on that likely were attacked by Redtail Hawks. Through the seasons you see the usual group of small upland game birds and others. Often towers and guys provide roosts for predators.

The experience of Washington’s broadcast stations underscores the uncommon nature of bird kills/injuries resulting from collisions with Washington broadcast transmission towers, whether the subject is narrowed to migratory birds or includes all birds. The practical experience and daily observations of broadcast engineers illustrates the complex nature of the interaction between birds and towers and, also provide a valuable, rich context of broad-based experience that the Commission should carefully consider when determining the necessity for, and the extent and nature of, any subsequent regulatory measures.

Respectfully submitted,

Dated: November 6, 2003



Mark Allen, President & CEO
Washington State Association of Broadcasters

CERTIFICATE OF SERVICE

I, Margaret L. Truitte, an administrative assistant in the offices of Davis Wright Tremaine LLP, certify that I have sent the foregoing "Comments of Washington State Association of Broadcasters" to the following via U.S. mail, postage prepaid:

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A handwritten signature in cursive script, reading "Margaret L. Truitte", written over a horizontal line.